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February 20, 2004

William J. Keese, Commission Chair
Garrett Shean, Hearing Officer
El Segundo AFC Committee
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

**RE: 00-AFC-14, El Segundo Generating Station – Comments on Presiding Member's
Proposed Decision (PMPD)**

Dear Commissioner Keese and Hearing Officer Shean:

This letter provides comments on PMPD #00-AFC-14 issued January 30, 2004. We have identified several significant shortcomings in the document, some of which raise serious questions as to whether a final decision based on the analysis provided in the PMPD could conform to applicable laws and regulations. Further, despite the PMPD's contentions to the contrary, the proposed project, even with the amendments recently accepted by the AFC Committee, does not conform to applicable Coastal Act policies, as stated by the Coastal Commission in its 30413(d) report, and does not meet Warren-Alquist Act requirements related to Coastal Act conformity.

It is difficult to comment on a document that strays so far from the law and convolutes so badly the plain language of applicable statutes, particularly when it applies to a proposed project with long-term and extensive impacts to California's coastal resources. We are therefore focusing on only two of our more substantial concerns at this time, in anticipation of your withdrawal and revision of the PMPD so that its significant shortcomings can be addressed. We plan to submit additional comments before the end of the current comment period and further, we reserve our ability to raise our complete set of concerns before the full Energy Commission during its eventual consideration of the proposed project.

Our comments herein focus on some of the document's several legal and regulatory misinterpretations regarding the Coastal Act and Warren-Alquist Act that, if not corrected as part of your final decision, would likely result in significant adverse environmental impacts and ongoing non-compliance with several state laws and regulations. The two primary areas of concern, each discussed in further detail later in this letter, are:

- 1) The baseline established in the PMPD for marine biological resources is incorrect and is legally insupportable.
- 2) The PMPD inappropriately ignores the requirement of the Warren-Alquist Act to allow review of the proposed project by the Coastal Commission and to incorporate specific provisions determined by the Coastal Commission to be necessary for the proposed project to conform to the Coastal Act.

At this point in the review, the proposed project, as currently configured with the Applicant's proposed amendments, will require additional review by the Coastal Commission before the Energy Commission can complete its AFC process and make its final determination.

1) The baseline established in the PMPD for marine biological resources is incorrect and is legally insupportable.

The PMPD's baseline for marine biological conditions is significantly flawed in at least three ways:

- a) It ignores basic definitions and requirements of CEQA;
- b) It inappropriately uses NPDES review in its CEQA baseline determination; and,
- c) The erroneous analysis used to determine baseline conditions makes it impossible for the project to conform to requirements of the Coastal Act.

The underlying error behind each of these is that the PMPD does not use current and relevant entrainment data to describe the existing conditions. As a result, no one knows what the existing conditions are, much less how much of a change in those conditions will result from implementation of the proposed project. These flaws result in the PMPD's unsupported and illusory findings that the proposed project has no significant adverse impacts on the marine environment. The problems resulting from these incorrect findings are compounded when the PMPD's baseline determination is applied to findings related to other elements of the proposed project such as those regarding seasonal flow caps, cumulative impacts, and the like.

1a) *The PMPD's baseline for marine biology ignores basic definitions and requirements of CEQA.*

CEQA clearly requires that the environmental effects of a proposed project be measured from existing baseline conditions. The CEQA Guidelines include several definitions and policies applicable to this environmental review and related to the determination of existing conditions; however, nowhere in the record of this AFC proceeding is there an adequate (and required) description of the full scope of these existing conditions. Therefore, by any reasonable reading of the applicable CEQA Guidelines, the PMPD's baseline determination for marine biology is incomplete and unsupportable, since it is based on incomplete citations of the applicable CEQA requirements and inadequate interpretation of those requirements. Essentially, the PMPD is attempting to determine how the proposed project will affect existing conditions without knowing what those conditions are.

Among the applicable CEQA Guidelines is Section 15358¹, which defines "effects" as including those caused by a project and occurring at the same time and place, and those occurring to air,

¹ CEQA Guidelines, Section 15358: "'Effects' and 'impacts' as used in these Guidelines are synonymous.

(a) Effects include:

- (1) Direct or primary effects which are caused by the project and occur at the same time and place.
- (2) Indirect or secondary effects which are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect or secondary effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems.

(b) Effects analyzed under CEQA must be related to a physical change."

water, and other natural systems, including ecosystems. Another is Section 15382², which defines a significant effect on the environment as including changes to "...land, air, water, minerals, flora, fauna..." and other aspects of the environment. Section 15125(a)³ further requires that the review be based on a description of the conditions in the vicinity of the project as they exist at or near the time environmental review begins. Additionally, Section 15125(c)⁴ requires that significant impacts be adequately investigated and discussed and that they be considered in the full environmental context.

Applying even the narrowest reasonable reading of the above-referenced applicable regulations to the proposed project would require consideration during environmental review of the effects of the cooling water flow on the marine biological community. The PMPD, however, bases its determination of baseline conditions almost exclusively on the amount of seawater that has been pulled into the power plant's cooling system over a particular period of time. While the PMPD takes great pains to identify which time period should be used to establish baseline cooling water flows, it excludes entirely any consideration of another far more important element of the existing environmental conditions, that of the marine biological community being directly affected by this cooling water flow. The PMPD merely depends on a study done over twenty years ago at a power plant more than seventy miles away to describe the current state of the marine biological community at El Segundo. The document then bases numerous findings on this inadequately supported contention that because the proposed project will not pull a greater volume of water into the system, "under CEQA, there is no environmental impact, let alone a significant environmental impact from the project" (PMPD, page 68).

Not only are CEQA requirements regarding baseline conditions inadequately applied to reach this erroneous conclusion about the direct impacts of the project, they are similarly misread in the PMPD's determination that there are no cumulative impacts. The definition of "cumulative impacts" at Section 15355 of the CEQA Guidelines includes those impacts resulting from two or more individual effects from a single project or from multiple projects, including current, past, and "reasonably foreseeable probable future projects". It also includes those effects that "compound or increase other environmental impacts". The PMPD dismisses the possibility that the proposed project could contribute to cumulative impacts in part due to the erroneous baseline

² CEQA Guidelines Section 15382: "Significant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. An economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant."

³ CEQA Guidelines Section 15125(a): "An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives."

⁴ CEQA Guidelines, Section 15125(c): "Knowledge of the regional setting is critical to the assessment of environmental impacts. Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project. The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context."

determinations described above, and in part due to the document's inaccurate and incomplete consideration of CEQA's definition of cumulative impacts. For example, the PMPD makes no mention of the numerous existing projects in the area that have been and are currently affecting marine life in Santa Monica Bay, nor does it acknowledge the effects on marine biology caused by the El Segundo Generating Station cooling water intake that are most certainly compounding or increasing the other adverse impacts being experienced by the marine biological community. As a result, the PMPD falls far short of the legal or factual analysis necessary to support its determination that the proposed project does not have cumulative biological impacts.

1b) The PMPD inappropriately uses NPDES review in its CEQA baseline determination.

The PMPD includes at least two significant flaws associated with using NPDES review in establishing its baseline for purposes of CEQA:

- First, NPDES review of cooling water intake systems such as the one at the proposed project is not equivalent to the review required under CEQA, and is in fact, exempt from CEQA. NPDES permit review, pursuant to federal and state water quality standards, is meant primarily to determine whether the existing once-through cooling system at the power plant provides the "Best Technology Available" for power plant cooling. Section 13389 of the Water Code specifically exempts waste discharge requirements including NPDES permits from undergoing CEQA review (except in the case of new sources, which does not apply in this AFC review). The fact that NPDES review is CEQA-exempt, and that it therefore involves a different type of review than the review required under CEQA, is further supported by the recent decision in *City of Burbank vs. State Water Board* (2003) 111 Cal.App.4th245⁵. It is therefore not appropriate in this AFC proceeding to use NPDES review to establish baseline conditions for purposes of CEQA compliance.

The PMPD compounds this error by incorporating into its determination NPDES findings on studies from the distant past and NPDES decisions that may potentially occur at some unknown point in the future. Regarding past reviews, the PMPD cites a statement from the facility's NPDES review from 2000 stating that a 1982 entrainment study from another power plant used as a surrogate study for the El Segundo facility determined that impacts were of "an environmentally acceptable order". Not only is this reliance on a 1982 study insufficient for purposes of CEQA to determine current conditions at the facility, the PMPD provides no basis for determining that the "environmentally acceptable" impacts identified in that review are somehow equivalent to CEQA's standard of "no significant impacts."

Regarding future reviews, the PMPD surmises that the proposed project will eventually be subject to future NPDES review under what may be a more stringent federal rule⁶. It is not

⁵ From p. 20-21 of the decision: "We conclude that Water Code section 13389 not only relieves Regional Board of the requirement to prepare an EIR or cause an EIR to be prepared (pub. Resources code, § 21100, subd. (a)), but also relieves Regional Board of those CEQA obligations that ordinarily are satisfied through preparation and consideration of an EIR, including the obligation to consider potential environmental impacts, project alternatives, and mitigation measures."

⁶ This rule, recently made final by the U.S. Environmental Protection Agency (40 CFR Parts 9, 122, 123, 124, and 125, no citation yet available in Federal Register), applies to cooling systems at existing power plants that pull in over 50 million gallons per day, and has as its primary requirement a significant reduction in the rate of entrainment, regardless of the past, present, or future cooling water flows. This approach is entirely different than the PMPD's

appropriate, for purposes of this current CEQA-equivalent review, to depend on the possibility of some future review to identify impacts and determine necessary mitigation measures. In sum, the Energy Commission's reliance on these past reviews or future possibilities does not equate to CEQA's requirement to identify significant impacts to existing conditions.

- Second, even if it were appropriate to use NPDES review in the place of CEQA review, the PMPD erroneously uses the NPDES permit's maximum permitted flow rate as the starting point for its analysis. This flow rate in no way equates to the actual conditions of the plant's operations over the past several years, and should not be used as the initial level upon which to determine baseline conditions. We note that the decision in *Save Our Peninsula Committee v. Monterey County Board of Supervisors* regarding establishment of CEQA baseline conditions recognized that other factors, including the recency of data and the use of available documents and records showing actual rates of use, must be incorporated into the determination of a baseline. For this proposed project, it is clear that the existing maximum permitted flow is not the same as the existing physical conditions, and that the available and recent data show a much lower "starting point" than was used in the PMPD. It is therefore not appropriate for purposes of this CEQA-equivalent review to use the maximum NPDES flow limit as a governing factor in the baseline conditions.

1c) The erroneous analysis used in the PMPD to determine baseline conditions makes it impossible for the project to conform to requirements of the Coastal Act.

Sections 30230 and 30231 of the Coastal Act require, among other things that marine resources and the biological productivity of coastal waters be maintained, enhanced, and where feasible restored⁷. The Coastal Commission specifically provided in its 30413(d) report that due to the proposed use of ocean water for cooling, it was necessary for the Applicant to complete an entrainment study in order to determine measures that would allow the proposed project to conform to these sections of the Coastal Act. It is then incumbent upon the Energy Commission, pursuant to Warren-Alquist Act 25523(b), to adopt this "specific provision" of the Coastal Commission's report into its decision, in this instance, for the purpose of establishing the

approach of identifying maximum allowable flows, comparing various actual flows during different time periods, and then determining that because the proposed project will have lower overall annual flows it will not have an impact. The PMPD, on one hand appears to depend on future application of this rule, and on the other, bases its analysis on an approach not incorporated into the rule.

⁷ Coastal Act Section 30230: "Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes."

Coastal Act Section 30231: "The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams."

baseline needed to determine conformity to the Coastal Act. Quite simply, to ensure conformity to these sections of the Coastal Act, one must know the existing conditions that are to be maintained, enhanced, or restored. Without adequate information about those existing conditions, a proposed project such as this cannot be found to conform to Coastal Act policies.

Rather than adopt this specific provision as required by Section 25523(b) of the Warren-Alquist Act, the PMPD ignored the Coastal Commission and instead accepted several project amendments proposed by the Applicant after the Coastal Commission provided its 30413(d) report. In a determination that is clearly in excess of the Energy Commission's legal authority, the PMPD then finds these amendments to be suitable for conformity to the Coastal Act (this issue is discussed in more detail later in this letter). The PMPD's acceptance of these amendments does nothing to remove the need for the entrainment study necessary for a determination of baseline conditions that is in turn a prerequisite to the achievement of Coastal Act conformity. As long as the project involves once-through cooling, the Energy Commission must incorporate into its review the Coastal Commission's "specific provision" consisting of completion of an entrainment study prior to project construction.

- 2) **The PMPD inappropriately ignores the requirement of the Warren-Alquist Act to allow review of the proposed project by the Coastal Commission and to incorporate specific provisions determined by the Coastal Commission to be necessary for the proposed project to conform to the Coastal Act.**

The PMPD thoroughly misinterprets and misses the entire point of the Coastal Commission's role in this AFC review as prescribed by the Warren-Alquist Act and Coastal Act. This misinterpretation takes several forms, each explained in further detail below:

- a) The PMPD inappropriately fails to incorporate "specific provisions" specified by the Coastal Commission in its 30413(d) report for reasons other than those permitted under the Warren-Alquist Act.
 - b) The PMPD inappropriately substitutes its judgment for that of the Coastal Commission in determining that substantial project modifications proposed by the Applicant are sufficient to bring the project into conformity to the Coastal Act.
 - c) The PMPD inappropriately uses a faulty analysis of LCP and Coastal Act conformity instead of using the Coastal Commission's direct determination regarding conformity to those statutes.
- 2a) ***The PMPD inappropriately fails to incorporate "specific provisions" specified by the Coastal Commission in its 30413(d) report for reasons other than those permitted under the Warren-Alquist Act.***

In its 30413(d) report on this AFC, the Coastal Commission found that the entrainment caused by the proposed project is not in conformity to the Coastal Act, but that a "specific provision" consisting of use the Hyperion Wastewater Treatment Plant as part of the cooling system would bring the project into conformity to the Act. The Commission additionally found that if this cooling system was not used, an alternative "specific provision" necessary for Coastal Act conformity was that the Applicant complete an entrainment study consistent with standards for such studies promulgated pursuant to CWA § 316(b).

Pursuant to Warren-Alquist Act Section 25523(b), the Energy Commission is required to incorporate those specific provisions into its decision unless the Energy Commission determines them to be infeasible or would cause greater adverse environmental impacts. The PMPD rejects the alternative cooling method for reasons of infeasibility, as allowed by section 25523(b). However, rather than incorporate the Coastal Commission's alternative "specific provision" of a new entrainment study, the PMPD instead accepts from the Applicant several project modifications that substantially change the proposed project. These modifications have the potential to cause significantly different impacts to coastal resources than those reviewed by the Coastal Commission, and, more importantly, would allow continuation of the entrainment effects noted by the Coastal Commission as necessitating a new entrainment study in order to achieve conformity to Coastal Act requirements. Regardless of the value or degree of mitigation these modifications might provide, they do not alter the obligation of the Energy Commission to include within its AFC decision "specific provisions" specified by the Coastal Commission in its 30414(d) report in accordance with the requirements of Section 25523(b).

Given the precedent represented by previous AFC decisions and the facts of this particular AFC review, we believe the Energy Commission has no rational basis to decline for reasons of infeasibility to include in its AFC decision the "specific provision" requiring the Applicant to perform an entrainment study. Regarding precedence, in each of its recent AFC reviews for power plants using marine waters for cooling, the Energy Commission determined, as part of its CEQA-equivalent review, that a new entrainment study is necessary to determine the effects of the proposed project on marine biology⁸. In each of the referenced proceedings, the Energy Commission required an entrainment study without regard to the magnitude of project-related cooling water flows as compared to existing flows, the difference between a project's maximum permitted NPDES flows and its existing flows, and the location of the proposed project and the conditions of the affected waterbodies. The common element in each of these AFC reviews was that the available entrainment data for the power plant were out of date – that is, they were from the same era as the El Segundo surrogate data. Regarding the facts of this particular AFC review, it would be unsupportable to find infeasible the Coastal Commission's specific provision requiring a new entrainment study, in part given that the Applicant has proposed paying into a restoration fund an amount approximately equivalent to the costs of such a study.

2b) *The PMPD inappropriately substitutes its judgment for that of the Coastal Commission in determining that substantial project modifications proposed by the Applicant are sufficient to bring the project into conformity to the Coastal Act.*

Late in the AFC process, the Applicant proposed three amendments to the project. The amendments include 1) an annual cap on the amount of cooling water to be used by the El Segundo facility, 2) payments into a Santa Monica Bay restoration fund, and 3) a study to determine whether it would be feasible to install and operate an aquatic filter barrier at the facility. Due to their being proposed so late, these amendments were not part of the project as reviewed by the Coastal Commission, and therefore, the Commission did not have the

⁸ See, for example, 99-AFC-3, Moss Landing; 00-AFC-12, Morro Bay, and 00-AFC-4, Potrero. The only exception to this usual CEC requirement was in the decision on the AES Huntington Beach Generating Station, 00-AFC-13. This AFC review was done under a special emergency provision allowing a faster review and decision-making process; however, even with this streamlined review, the decision required the applicant to conduct an entrainment study in order to determine mitigation that may be needed for the impacts.

opportunity required by the Warren-Alquist Act to review the amended proposed project for conformity to the Coastal Act⁹. In its 30413(d) report, however, the Commission recognized the possibility that the Applicant might present an amended project, and the Commission therefore concluded its report by stating that it reserved its "right to review future submittals for conformity with the Coastal Act".

Instead of providing such an opportunity to the Commission, the PMPD inappropriately accepts the applicant's proposed project amendments and adopts findings as to whether those amendments allow the project to conform to the Coastal Act. These actions are entirely inconsistent with the requirements of both the Warren-Alquist Act and the Coastal Act, which recognize the Coastal Commission's preeminent authority and expertise with regard to issues of Coastal Act conformity.

Since the Energy Commission has apparently accepted these amendments as part of the project, they now require additional review by the Coastal Commission pursuant to Coastal Act Section 30413(d). It is the Coastal Commission, not the Energy Commission, that is vested with the statutory authority to determine the extent to which the subject project modifications bring the project into conformity with the standards of the Coastal Act, or, in other words, whether they can be found to represent an adequate substitute for the "specific provision" of an entrainment study previously specified by the Coastal Commission.

In addition to the concerns above, the decision by the PMPD to include these amendments raises substantial concerns about how and whether they would be implemented. For example, installing an aquatic filter barrier would require not only the review of the Regional Board, as provided in the PMPD, but would also require a lease amendment by the State Lands Commission. The PMPD mentions that the Applicant's previous lease with State Lands expired in October 2002 and is continuing on a month-to-month basis, and states that the Applicant has applied for a lease modification or a new lease. However, the PMPD does not incorporate any consideration of the impacts that would occur if a modified lease allowing the aquatic filter barrier is not approved. Not only is this another example of the PMPD depending on the possibility of a future review and decision to implement an element of the project, it raises the question of whether such a measure is feasible. We note as well that the review of a proposed aquatic filter barrier may itself require an entrainment study to determine both its impacts and its efficacy.

2c) The PMPD inappropriately uses a faulty analysis of LCP and Coastal Act conformity instead of using the Coastal Commission's direct determination regarding conformity to those statutes.

In undertaking to determine conformity of the proposed amended project to the Coastal Act, the PMPD reaches an inaccurate and convoluted conclusion that because the power plant was present in El Segundo when the Coastal Commission certified El Segundo's LCP years ago, the project must be in conformity to the Coastal Act. The PMPD substitutes this conclusion for the

⁹ We also note that the Executive Director of the Coastal Commission in letters of January 22, 2003 and February 10, 2003 to the Committee stated that the amended proposed project did not address the findings and specific provisions provided by the Coastal Commission in its report.

Coastal Commission's contrary statement in its 30413(d) report that the proposed project does not conform to applicable provisions of the Coastal Act. The PMPD seems to be asserting that because the Coastal Commission in 1982 certified an LCP that recognized the existence of the power plant, all future development activity at that power plant must simply be assumed to conform to Coastal Act requirements.

In making this determination, the PMPD contravenes the requirements of the Warren-Alquist Act and the Coastal Act, both of which charge the Coastal Commission with determining conformity to both the Coastal Act and any LCPs certified thereunder. Further, the PMPD relies on an interpretation of an LCP to determine whether elements of the project outside the jurisdiction of the LCP conform to the Coastal Act. This is despite the testimony provided by a Coastal Commission staff member explaining the distinction between the Coastal Commission's retained jurisdiction and the jurisdiction of the City (see PMPD, page 57). The Committee was informed at its evidentiary hearing that the coastal waters offshore of the City of El Segundo are within the retained permit jurisdiction of the Coastal Commission. For purposes of this AFC review, any applicability of the City's LCP to elements of the proposed project in offshore waters is to be determined solely by the Coastal Commission.

Rather than the convoluted and inaccurate analysis described above that serves as the basis for the PMPD's determination, it should instead base its conclusion on Coastal Act § 30413(d)(5), which assigns to the Coastal Commission the duty of making findings regarding the conformity of the proposal with both the Coastal Act and any affected LCPs certified thereunder.

Conclusion:

We recommend the Energy Commission withdraw the PMPD and take one of the following actions:

- Reject the Applicant's proposed project amendments and require the Applicant conduct the entrainment study determined by the Coastal Commission to be a specific provision necessary for the proposed project's conformity to the Coastal Act.
- Retain the Applicant's proposed amendments as part of the project proposal and request the Coastal Commission (and other interested agencies) review this updated version of the proposal for conformity to the Coastal Act (and other applicable laws and regulations).

Absent either of these two actions, the PMPD as it is now written will not meet the basic requirements of CEQA, the Warren-Alquist Act, or the Coastal Act, and the project as currently proposed, does not include the measures necessary to ensure that adverse environmental effects will be avoided, minimized, or otherwise mitigated, much less that they will be adequately identified.

Thank you for the opportunity to comment. I will make my staff available to help resolve the issues outlined above. Please contact Tom Luster of the Coastal Commission staff at (415) 904-5248 if you have questions or would like additional information.

Sincerely,

A handwritten signature in cursive script, appearing to read "Peter Douglas for".

Peter Douglas
Executive Director

Cc: 00-AFC-14 Service List